Marcel Jude v The Chairman Election Commission of Malaysia

HIGH COURT (KOTA KINABALU) — CASE NO BKI-13JR-11/5 OF 2013
RAVINTHRAN J
17 JUNE 2013

Civil Procedure — Judicial review — Election — Allegation of dubious entries in electoral roll — Whether grounds of contest of electoral roll valid — Whether electoral roll tainted with dubious entries — Application filed three days before polling day but heard after conclusion of elections — Whether electoral roll could be challenged — Elections Offences Act 1954

The applicant was an Advocate of the Sabah and Sarawak High Court and a candidate in the general election while the defendant was the Chairman of the Election Commission of Malaysia. The applicant complained of the legitimacy of the electoral roll and prayed for, inter alia, a mandamus order to compel the respondent to examine 60,673 'dubious entries'; a certiorari order to quash the writ and notice of election issued by the respondent and an order to prohibit the respondent from issuing the same until the dubious entries were removed from the electoral roll; an order to quash the election result in N15 Api Api in the event he was unsuccessful; application to quash the election result in N16 Luyang and P172 Kota Kinabalu and prohibition of the respondent from conducting further elections; a refund of his candidature deposit of RM8,000; and damages for the alleged negligence and misrepresentation of the respondent in issuing the writ and notice of election for N15 Api Api, N16 Luyang and P172 Kota Kinabalu without 'removal of disclosure' of the said 'dubious entries'. The source of the applicant's suspicion that the electoral roll was tainted with dubious entries was a report that appeared in a few print and online newspapers. The reports quoted the respondent as purportedly saying that the electoral roll containing 60,673 dubious entries still 'legit' and could not be 'junked' as Royal Commission of Inquiry ('RCI') that was looking into the 'citizenship-for-votes controversy' had yet to conclude its hearing. The application was file just three days before polling day but was only heard after the elections were concluded. The respondent argued that the electoral roll could not be challenged and therefore, it was useless to grant leave and proceed to the second stage of the application.

Held, dismissing the application with costs of RM5,000:

(1) The validity of the writ and notice of election was not a live issue anymore as it was common ground that the elections were over. It was also

unnecessary for the court to deal with the prayers for an order of certiorari to quash the election results in the three constituencies and obtain a refund of his deposit as an election result could only be nullified through an election petition filed under the Elections Offences Act 1954 ('the Act'). No higher authority than art 118 of the Federal Constitution was needed to support this proposition (see para 7).

(2) The respondent merely said that the certified electoral roll would be used as no objections were recorded during the two-week objection period when it was on public display. The respondent did not say that the electoral roll was tainted with 60,673 dubious entries. The allegation of taint was made by an official of a non-governmental organisation (see para 12).

(3) There was no burden on the respondent to produce any evidence during the leave stage. If there was evidence that the electoral was not certified or not published in the gazette, the applicant should have disclosed it in his statutory statement or affidavit in support. The court should take judicial notice that the electoral roll was duly published in the *gazette* (see para 17).

(4) The leave application did not disclose an arguable case and s 9A of the Act prevented the court from questioning the electoral roll. Therefore, it was unnecessary to consider other issued raised by the parties (see para 18).

[Bahasa Malaysia summary

Pemohon adalah Peguambela Mahkamah Tinggi Sabah dan Sarawak dan calon di dalam pilihan raya umum sementara defendan adalah Pengerusi Suruhanjaya Pilihanraya Malaysia. Pemohon mengadu mengenai kesahan daftar pemilih dan memohon untuk, antara lain, perintah mandamus untuk memaksa responden memeriksa 60,673 'dubious entries'; perintah certiorari ountuk membatalkan writ dan notis pilihan raya yang dikeluarkan oleh responden dan perintah untuk melarang responden daripada mengeluarkannya sehingga kemasukan yang meragukan ditolak daripada daftar pemilih; perintah untuk membatalkan keputusan pilihan raya di N15 Api Api jika dia tidak berjaya; permohonan untuk membatalkan keputusan pilihan raya di N16 Luyang dan P172 Kota Kinabalu dan melarang responden daripada menjalankan pilihan raya selanjutnya; bayaran balik deposit pencalonannya sebanyak RM8,000; dan ganti rugi untuk kecuaian yang didakwa dan salah nyata responden dalam mengeluarkan writ dan notis pilihan raya untuk N15 Api Api, N16 Luyang dan P172 Kota Kinabalu tanpa 'removal of disclosure' 'dubious entries' tersebut. Punca kesangsian pemohon bahawa daftar pemilih dicela dengan kemasukan yang meragukan adalah laporan yang diterbitkan di dalam beberapa suratkhabar dalam talian dan cetakan. Laporan tersebut memetik bahawa responden seperti menyatakan bahawa daftar pemilih yang mengandungi 60,673 kemasukan yang meragukan masih 'legit'

dan bukan 'junked' seperti Suruhanraya Siasatan DiRaja yang menyiasat ke dalam 'citizenship-for-votes controversy' yang masih belum memutuskan pendengarannya. Permohonan difailkan hanya tiga hari sebelum hari mengundi tetapi hanya didengar selepas pilihan raya tersebut selesai. Responden berhujah bahawa daftar pemilih tidak boleh dicabar dan oleh itu, adalah tidak berguna untuk memberikan izin dan meneruskan ke peringkat kedua permohonan tersebut.

Diputuskan, menolak permohonan dengan kos sebanyak RM5,000:

(1) Kesahan writ dan notis pilihan raya bukan lagi isu semasa kerana ia adalah alasan biasa bahawa pilihan raya telah tamat. Juga tidak perlu untuk mahkamah untuk berurusan dengan permohonan-permohonan untuk perintah certiorari untuk membatalkan keputusan pilihan raya di dalam ketiga-tiga kawasan tersebut dan mendapatkan bayaran balik depositnya kerana keputusan pilihan raya hanya boleh dibatalkan melalui petisyen pilihan raya difailkan di bawah Akta Kesalahan Pilihan Raya 1954 ('Akta'). Tiada kuasa lebih besar daripada perkara 118 Perlembagaan Persekutuan diperlukan untuk menyokong cadangan ini (lihat perenggan 7).

(2) Responden hanya menyatakan bahawa daftar pemilih yang disahkan tersebut akan digunakan memandangkan tiada bantahan direkodkan semasa tempoh bantahan dua minggu tersebut semasa berada dalam pameran awam. Responden tidak menyatakan bahawa daftar pemilih tersebut dicela dengan 60,673 kemasukan yang meragukan. Dakwaan mengenai kecelaan tersebut dibuat oleh pegawai organisasi bukan kerajaan (lihat perenggan 12).

(3) Tiada beban ke atas responden untuk mengemukakan apa-apa keterangan semasa peringkat izin. Jika terdapat keterangan bahawa daftar pemilih tidak disahkan atau tidak diterbitkan di dalam warta, pemohon patut mendedahkannya dalam pernyataan statutori atau afidavit menyokong. Mahkamah patut mengambil pengiktirafan penghakiman bahawa daftar pemilih diterbitkan dengan sewajarnya di dalam warta (lihat perenggan 17).

(4) Permohonan izin tidak mendedahkan kes yang boleh dipertikaikan dan s 9A Akta menghalang mahkamah daripada menyoal daftar pemilih. Oleh itu, adalah tidak perlu untuk mempertimbangkan isu lain yang dibangkitkan oleh pihak-pihak (lihat perenggan 18).]

Cases referred to

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33, SC (refd)

Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia [1989] 3 MLJ 298, HC (refd)

MAS Golden Boutique Sdn Bhd v Md Zain bin Abu [1999] 3 MLJ 201; [1999] 3 CLJ 610, HC (refd)

Muhammad Sanusi Md Sanusi lwn Mohd Tajuddin Abdullah & Yang Lain [2009] 1 CLJ 1, FC (folld)

Ruhimin Adzim @ Ruhimin bin Ajim v Tan Sri Bernard Dompok & Ors [2005] 1 MLJ 345; [2004] 1 LNS 575, HC (refd)

Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555; [2008] 6 CLJ 235, CA (refd)

Legislation referred to

Elections Act 1958 s 9A
Elections Offences Act 1954
Federal Constitution arts 118, 161
Rules of Court 2012 O 53, O 53 r 3

Marcel Jude for the applicant.
Rahazlan Effendi Abd Rahim (Senior Federal Counsel Attorney General's Chambers) for the respondent.

Ravinthran J:

INTRODUCTION

[1] This is an ex parte application for leave for judicial review under O 53 r 3 of the Rules of Court 2012 ('ROC 2012'). The leave application was duly served on the attorney general's office. Senior federal counsel has opposed the leave application.

BRIEF BACKGROUND FACTS

[2] The applicant is an advocate of the Sabah and Sarawak High Court. The defendant is the chairman of the Election Commission of Malaysia. The applicant appeared in person. He was a candidate in the recently concluded general elections which was held on 5 May 2013. He contested the State Constituency of N15 Api Api. He is also a registered voter in the State Constituency of N16 Luyang and the Parliamentary Constituency of P172 Kota Kinabalu. The complaint of the applicant is in respect of the legitimacy of the electoral roll. However, this application was filed just three days before polling day. Hence, the application was heard only after the elections were concluded.

REMEDIES SOUGHT BY THE APPLICANT

[3] For ease of reference and understanding, I shall first summarise the remedies prayed for by the applicant. In prayer (a) he has applied for an order of mandamus to compel the respondent to examine 60,673 'dubious entries' in the electoral roll. In prayers (b) and (c), he is applying for a mandamus order to remove the same, particularly in N15 Api Api, N16 Luyang and P172 Kota Kinabalu. In prayers (d) and (e), the applicant is praying for an order of certiorari to quash the writ of election and notice of election issued by the respondent and an order to prohibit the respondent from issuing the same until the 'dubious entries' are removed from the electoral roll. In prayer (f), he is applying for an order to quash the election result in N15 Api Api in the event he is unsuccessful. In prayer (g), the applicant is applying to quash the election result in N16 Luyang and P172 Kota Kinabalu and prohibit the respondent from conducting further elections. In prayer (h), he is applying for a refund of his candidature deposit of RM8,000. In prayers (i) and (j), he is applying for damages for the alleged negligence and misrepresentation of the respondent in issuing the writ of election and notice of election for N15 Api Api, N16 Luyang and P172 Kota Kinabalu without 'removal or disclosure' of the said 'dubious entries'.

THRESHOLD TEST FOR LEAVE

[4] The threshold test for a judicial review leave application is that the applicant must have an arguable or a prima facie case (see *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33). The test for an 'opposed' ex parte leave application is the same (see *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298). Although the threshold test for a judicial review leave application is low, the court must be satisfied that the application is one that is not vexatious, frivolous or groundless. In *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235 which was cited by learned senior federal counsel, Suriyadi Halim Omar JCA (as he then was) at the Court of Appeal said as follows:

> It will be pointless to grant leave, even if the appellant were to have sufficient interest over the matter, if it is crystal clear that its case is a hopeless one on its merits; or the appellant's case rests only on non-justiciable issues.

[5] The basic argument of learned senior federal counsel is that the electoral roll cannot be challenged and therefore it is useless to grant leave and proceed to the second stage of the application. The applicant contends otherwise. I shall

now proceed to consider some points that are essentially moot or unarguable.

PRAYERS (D) AND (E)

[6] Under prayers (d), the applicant is applying for an order to quash the writ of election and notice of election which was published in the *gazette* pursuant to the statutory powers of the respondent. He is also applying for an order to further prohibit the respondent from issuing the writ of election and notice of election under prayer (e). I would observe that the validity of the election writ and notice of election is not a live issue anymore as it is common ground that the elections are over. In the premises, it is unnecessary and otiose for me to consider this issue.

PRAYERS (F), (G) AND (H)

[7] The remedy that the applicant seeks under the above prayers is for an order of certiorari to quash the election results in the said three constituencies and obtain a refund of his deposit. It is again unnecessary for me to deal with this issue at any length as it is goes without saying that an election result can only be nullified through an election petition filed under the Elections Offences Act 1954 (Revised 1969). In my view, no higher authority than art 118 of the Federal Constitution is needed to support this proposition. Article 118 of the Federal Constitution reads as follows:

> No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

[8] I shall now move to consider whether the applicant has disclosed an arguable case in respect of the rest of the remedies prayed for in the judicial review application.

VALIDITY OF ELECTORAL ROLL

[9] The foundation of the instant judicial review application is the argument that the electoral roll used in Sabah for the 2013 General Elections contains 60,673 'dubious entries'. If this argument is found to be totally unmeritorious or hopeless, the leave application would collapse like a house of cards. In other words, no useful purpose would be served by granting leave to the applicant to proceed to the second stage of the application. I shall, therefore, first consider the argument that the electoral roll is tainted.

[10] The source of the applicant's suspicion that the electoral roll is tainted with dubious entries is a report that appeared in a few print and online

newspapers on 1 May 2013. The applicant reproduced the report in the *Borneo Post* newspaper dated 1 May 2013 in his affidavit in support. He also attached the *Malaysia Insider* (an online news portal) report dated 30 April 2013 which is similarly worded. These reports quoted the respondent as purportedly saying that the electoral roll containing 60,673 dubious entries is still 'legit' and cannot be 'junked' as a Royal Commission of Inquiry ('RCI') that is looking into the 'citizenship-for-votes controversy' has yet to conclude its hearing. For ease of reference, I would reproduce the first four paragraphs of *Malaysia Insider* report below:

> Kuala Lumpur April 30: Sabah's electoral roll containing 60,673 dubious entries is still legit and cannot be junked as the royal panel looking into the citizenship-for-votes controversy has yet to conclude any wrongdoing, the Election Commission (EC) said today.
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> An independent polls watchdog had highlighted this morning that Sabah's gazetted electoral roll used for the 13th general election was plagued with a large number problems, such as incomplete addresses and voters who shared the same identity card (IC) numbers, months after a royal commission of inquiry (RCI) had exposed much irregularities in the naturalization process for immigrants.
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> 'The list of registered voters raised in the RCI is still legit, besides no final decision has been reached. The RCI has yet to end and make its decision, how can we discard the electoral roll,' EC chief Tan Sri Abdul Aziz Mohd Yusof told The Malaysian Insider. He also said that the names on the EC's roll were Malaysian citizens, adding that the voter list had been on public display for two weeks starting from January 17 and no objections had been recorded during that period. 'EC had displayed the list for two weeks, if they objected, it should have been made in that period. 'Why raise it now and make all sorts of accusations?' Abdul Aziz asked.
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> An official with polls watchdog, Malaysian Electoral Roll Analysis Project (MERAP) told a news conference today that 60,653 voters were registered in Sabah with incomplete addresses, 44 of them under a different gender, 193 under a different year of birth, and 123 under a state they were not born in.

[11] In the opening paragraph of his written submission, the applicant said as follows:

> The admission by the Respondent of the 60,673 dubious voters was not only shocking but what was more even appalling is the fact that he said that the rolls was legit (short for legitimate). Certainly such a statement by itself is a matter of serious public interest, so serious that the Attorney General should be more concerned to get to the truth of the matter rather than raise objection which would cast the government and the outcome of the GE13 in negative territory. It would not do much to boost public confidence.

[12] I would pause to observe that the above report and other similarly worded reports reveal that the respondent merely said that the certified

electoral roll would be used as no objections were recorded during the two weeks objection period when it was on public display. The respondent did not say that the electoral roll was tainted with 60,673 dubious entries. The allegation that the electoral roll was tainted with 60,673 dubious entries was made by an official of a non-governmental organisation. Therefore, the only 'evidence' provided in the affidavit in support is news reports which don't even support the claim of the applicant that the respondent had admitted there were 60,673 dubious entries. The applicant submitted that this issue should be examined at the second stage of the judicial review application or after the Royal Commission of Inquiry on illegal immigrants had concluded its hearing. Although the burden of proof to obtain leave is low, the applicant is still obliged to disclose an arguable case. Otherwise, the leave stage provided in O 53 of the ROC 2012 would fail to function as a filter to weed out frivolous applications (see *MAS Golden Boutique Sdn Bhd v Md Zain bin Abu* [1999] 3 MLJ 201; [1999] 3 CLJ 610). The applicant also suggested in his submission that the court should wait for the recommendations of the ongoing Royal Commission of Inquiry on illegal immigrants. In my view, if the applicant did not possess sufficient evidence as yet, he should not use the leave application as a fishing expedition. As the judicial review application for leave does not disclose an arguable case, it should be dismissed on this ground alone. However, I shall proceed to consider another issue before I dismiss this application.

[13] Learned senior federal counsel has also submitted to the court that, as a matter of law, the electoral roll cannot be reviewed or challenged in court and therefore the leave application should be dismissed outright. His submission is based on s 9A of the Elections Act 1958 which reads as follows:

> After an electoral roll has been certified or re-certified, as the case may be, and notice of the certification or recertification has been published in the *Gazette* as prescribed by regulations made under this Act, the electoral roll shall be deemed to be final and binding and shall not be questioned or appealed against in, or reviewed, quashed or set aside by, any court.

[14] The applicant argued that generally ouster clauses cannot deprive the court of jurisdiction. He submitted a lengthy list of well known cases where courts have examined decisions of an inferior tribunal or a public authority on grounds that it acted without jurisdiction or committed an error of law. Section 9A was only inserted in the Elections Act 1958 in 2002. The Federal Court in the case of *Muhammad Sanusi Md Sanusi lwn Mohd Tajuddin Abdullah & Yang Lain* [2009] 1 CLJ 1 had occasion to consider the above provision. Alauddin Mohd Sheriff CJ (Malaya) said as follows in respect of the finality of the electoral roll by virtue of s 9A:

> Jelas bagi kami bahawa daftar pemilih adalah muktamad dan tidak boleh dipertikaikan di dalam mana-mana mahkamah. Begitulah maksud dan hasrat s 9A APR 1958 yang telah dihuraikan di atas.

[15] The above statement means that the electoral roll is final and cannot be called into question in any court. In *Ruhimin Adzim @ Ruhimin bin Ajim v Tan Sri Bernard Dompok & Ors* [2005] 1 MLJ 345; [2004] 1 LNS 575, Clement Skinner J (as he then was) said the same thing when the electoral roll was challenged:

> The sixth objection was that the petitioner contravened s 9A of the Act, in that in the second part of para 7 of the petition the petitioner alleged that voters were unable to cast their votes on polling day because their names could not be found in the electoral rolls or were unlawfully removed from the electoral rolls whereas they had previously voted at the constituency.
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> Section 9A of the Act provides that once an electoral roll has been certified or recertified and notice of such fact has been published in the Gazette, it 'shall be deemed to be final and binding and shall not be questioned or appealed against it, or reviewed, quashed or set aside by, any court.'

[16] The applicant urged me not to follow the apex court decision of *Muhammad Sanusi Md Sanusi lwn Mohd Tajuddin Abdullah & Yang Lain* for two reasons. The first reason is that it is an election petition case whereas the instant case is judicial review case. In my view there is no merit in this submission for the reason that s 9A says that the electoral roll shall not be challenged in 'any court'. Therefore, whether it is an election court or a court hearing a judicial review application, s 9A should apply with equal force. The second reason of the applicant is, in his own words, a novel one. He submitted that the judgment of the Federal Court is in the Malay Language and therefore not binding as the language of the courts in Sabah is English. The applicant highlighted art 161 of the Federal Constitution which provides for the continued use of the English Language in the High Court of Sabah and Sarawak. Without being disrespectful to the applicant, I found it unnecessary to invite learned senior federal counsel to respond to this point. Needless to say, the point is utterly unmeritorious. The applicant was not compelled to submit in the Malay Language during the proceedings. The use of a precedent that is written in the Malay Language does not mean that art 161 was breached. In conclusion, *Muhammad Sanusi Md Sanusi lwn Mohd Tajuddin Abdullah & Yang Lain* which is a Federal Court decision is binding on this court. As s 9A provides that the electoral roll that has been certified and published in the *gazette* is final and binding, the instant judicial review action is bound to fail even if leave were granted.

PUBLICATION OF ELECTORAL ROLL IN THE GAZETTE

[17] For sake of completeness, I shall also mention that the applicant did not deny that he failed to raise any objection to the electoral roll in all the three constituencies during the two-week objection period. However, he attempted to raise a final argument that the respondent did not produce evidence that the electoral roll was published in the *gazette*. As learned senior federal counsel submitted, there is no burden on the respondent to produce any evidence during the leave stage. If there was evidence that the electoral roll was not certified or not published in the *gazette*, the applicant should have disclosed it in his statutory statement or affidavit in support. Hence, the court should take judicial notice that the electoral roll was duly published in the *gazette*.

CONCLUSION

[18] In view of my finding that the leave application does not disclose an arguable case and that s 9A of the Election Act 1958 prevents the court from questioning electoral roll, I find it unnecessary to consider other issues raised by the applicant and learned senior federal counsel. The leave application is hereby dismissed with costs of RM5,000.

Application dismissed with costs of RM5,000.

Reported by Afiq Mohamad Noor